

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE JAMAL FREEMAN,

Defendant-Appellant.

UNPUBLISHED

September 22, 2000

No. 219812

Washtenaw Circuit Court

LC No. 97-008271-FH

Before: Murphy, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

After a trial by jury, defendant was convicted of two counts of first-degree murder, MCL 750.316; MSA 28.548, two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and one count of possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6). Defendant was sentenced to concurrent terms of life imprisonment for each first-degree murder conviction, and a concurrent term of forty to sixty months' imprisonment for the possession of a firearm by a felon conviction. These sentences were to be served consecutively to concurrent terms of two years' imprisonment for each felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises from the shooting deaths of David James and Teeahnah Kendred. According to the testimony at trial, defendant and an accomplice went to the home of the victims and shot them after robbing them of drugs and money. Defendant's former girlfriend, Darnia Townsend, testified that defendant confessed the killings to her, and a jail inmate testified that defendant bragged of the murders while incarcerated. In addition, DNA evidence connected defendant to items found in the victims' home and ballistics tests, in conjunction with a portion of Townsend's testimony, connected defendant to the gun used in the killings.

At trial, plaintiff introduced Townsend's testimony about an incident involving defendant eight months before the murders. Townsend testified that defendant fired a gun at her while she stood in the doorway of her home. Police investigating the murders retrieved the bullets from this incident and compared them with the bullets used to commit the murders. Testing revealed that the bullets had been fired from the same .380 gun. Plaintiff sought introduction of this testimony at trial to link defendant with

the murder weapon, and defendant argued that the testimony should be excluded pursuant to MRE 404(b). The trial court permitted the testimony and defendant now contends that the trial court erred. We disagree.

This Court reviews a trial court's admission of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), citing *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995). "An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

MRE 404(b)(1) deals with the admissibility of other crimes, wrongs, or acts and provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

"MRE 404(b)(1) . . . is a rule of inclusion that contains a nonexclusive list of 'noncharacter' grounds on which evidence may be admitted. This rule permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct." *Starr, supra* at 496, citing *People v Engelman*, 434 Mich 204, 213; 453 NW2d 656 (1990). Thus, prior bad act evidence is admissible under MRE 404(b) if the court concludes:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).]

It is well established that it is a proper purpose under MRE 404(b) to use prior bad act testimony to show access to a murder weapon, *People v Billington*, 116 Mich App 220, 231; 323 NW2d 343 (1982), or to demonstrate that defendant was previously observed with the weapon involved in a crime while committing another crime. *People v Robinson*, 128 Mich App 338, 340-341; 340 NW2d 303 (1983); *People v Yacks*, 49 Mich App 444, 451; 212 NW2d 249 (1973). Thus, we find that it was a proper purpose under MRE 404(b) to use Townsend's testimony to demonstrate that defendant was observed with the murder weapon before the murder occurred.

We also conclude that Townsend's testimony was relevant. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, Townsend's testimony coupled with the ballistics evidence established that defendant was in possession of one of the guns used to commit the murders. "Evidence of a defendant's possession of a

weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense.” *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989).

Defendant argues that Townsend’s testimony was not relevant because it only established that defendant had possession of the gun eight months before the murders, and additional evidence suggested that two other individuals were in possession of the gun nearer the time of the crime. However, as the trial court noted, this fact does not impact the admissibility of this evidence. Instead, it relates to the weight that the evidence will be afforded by the jury. Thus, the trial court did not err when it concluded that the evidence was relevant.

We also conclude that the probative value of Townsend’s testimony was not substantially outweighed by the danger of unfair prejudice. We have repeated:

“Any relevant testimony will be damaging to some extent. We believe that the notion of ‘unfair prejudice’ encompasses two concepts. First, the idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury. In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, a situation arises in which the danger of ‘prejudice’ exists. Second, the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it. Where a substantial danger of prejudice exists from the admission of particular evidence, unfairness will usually, but not invariably, exist.” [*People v Harvey*, 167 Mich App 734, 746; 423 NW2d 335 (1988), quoting *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983).]

The testimony of Townsend, although prejudicial, was not unfairly so. Further, this testimony was highly probative because it provided direct evidence linking defendant to the murder weapon. This Court has stated that where “there was no eyewitness to testify at trial and there was strong evidence linking defendant to both crimes . . . the trial court appropriately balanced the probative value without abusing its discretion and properly admitted the evidence of defendant’s earlier felonious conduct.” *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). This is particularly true when, as in this case, the trial court gave a limiting instruction to the jury that appropriately focused the jury’s attention on the purpose of the testimony.

Defendant also contends that the substance of Townsend’s testimony violated the trial court’s ruling. However, we decline to review this issue because it was not preserved for appellate review. “A party opposing the admission of evidence must timely object at trial and specify the same ground for objection that it asserts on appeal.” *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Defendant never objected to Townsend’s testimony because it violated the trial court’s ruling. Rather, defendant merely reiterated the objection that the testimony was impermissible under MRE 404(b) evidence. Although we recognize that this Court can review an unpreserved claim of error to prevent

manifest injustice, *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999), we find the overwhelming evidence of defendant's guilt precludes such review in this case.

Finally, defendant attacks the testimony of a witness who, by detailing telephone conversations with the victim and defendant on the night of the murders, placed defendant at the scene of the crime. Defendant argues that the witness' testimony was perjured, and in connection with this claim defendant contends that the trial court erred, the prosecution committed misconduct, and defense counsel was ineffective.

We find no merit to any of defendant's claims. Defendant's only evidence that the witness committed perjury is defendant's judgment of sentence from an unrelated case and a letter from the circuit court stating defendant's sentence in that case. Defendant claims that this documentation proves that defendant was incarcerated when the murders were committed. Contrary to defendant's assertion, however, the judgment of sentence only indicates that defendant was ordered to serve a ten month sentence. It is not indicative of the time actually served or defendant's actual release date. Indeed, the letter from the circuit court specifically states, "Any information as to your actual release date would have to be ascertained from the Michigan Department of Corrections."

Defendant provides nothing from the MDOC indicating his actual release date. Moreover, both Townsend and defendant's own sister testified that defendant was released from jail before the completion of his ten month sentence. Not only did defendant make no objection to the testimony of these witnesses that they spent time with defendant, out of jail, in the weeks leading up to the murders, he also failed to raise, at any time during trial, the openly exculpatory claim that he could not have participated in the killings because of contemporaneous incarceration. Accordingly, we find defendant's supplemental appellate claims both mystifying and baseless.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder